STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LEROY PONCHAUD, JR.,
a/k/a JOHN FRANCIS PONCHAUD,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 195672
Iron Circuit Court
LC No. 95-007857-FH

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). Defendant also pleaded guilty to distributing obscene material to a minor. MCL 722.675; MSA 25.254(5). Defendant was sentenced to serve two years and six months to fifteen years in prison for the second-degree CSC conviction. We affirm.

Defendant first argues that the trial court erred when it failed to instruct the jury that in order to establish the element of "sexual contact" necessary to find defendant guilty of second-degree CSC, it must find that defendant experienced sexual arousal or gratification. However, defendant did not object to the instructions at trial. Absent an objection, relief will be granted only in cases of manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). In this case, we have reviewed the instructions and find no manifest injustice. See *People v Piper*, 223 Mich App 642; __ NW2d __ (1997).

Defendant next contends that the evidence was insufficient to support a conviction on second-degree CSC, because there was no evidence that defendant experienced any sexual arousal or gratification. We disagree. There is no need to prove defendant specifically intended sexual gratification when he touched the complainant. *Piper*, *supra* at 650. Criminal sexual conduct in the second degree is a general intent crime. *Id*. The statute punishes conduct which, when viewed objectively, could reasonably be construed as being for a sexual purpose; defendant's mens rea is

irrelevant. *Id*. at 647, 650. Consequently, there is no need to prove that defendant was actually sexually gratified or aroused. Viewed in a light most favorable to the prosecution, the evidence shows that defendant shaved his fourteen-year-old stepdaughter's pubic hair while she stood completely naked in the bathroom. Although no specific evidence of defendant's state of sexual arousal or gratification was presented at trial, the act itself was such that a rational trier of fact could reasonably construe defendant's conduct as being for a sexual purpose. There was sufficient evidence presented to support defendant's conviction.

Defendant next argues that the trial court erred in refusing to instruct the jury on the offense of fourth-degree CSC, MCL 750.520e; MSA 28.788(5). We disagree. Fourth-degree CSC is a misdemeanor. MCL 750.520e(2); MSA 28.788(5)(2) The decision whether to give a requested instruction on a lesser misdemeanor offense is a matter of discretion for the trial court and is reviewed on appeal for an abuse of discretion. *People v Steele*, 429 Mich 13, 21-22; 412 NW2d 206 (1987). Failure to give such an instruction is an abuse of discretion if a reasonable person would find no justification or excuse for the ruling made. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

A trial court must instruct the jury concerning a lesser misdemeanor offense where (1) a proper request is made, (2) there is an inherent relationship between the greater and lesser offense, (3) the requested misdemeanor is supported by a rational view of the evidence adduced at trial such that a jury could consistently find the defendant innocent of the greater offense and guilty of the lesser offense, (4) the defendant had adequate notice if the instruction was requested by the prosecutor, and (5) no undue confusion or other injustice would result. See *Steele*, *supra* at 18-22; *People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994). In order to satisfy the third requirement of the above test, proof on the element or elements differentiating the crimes must be sufficiently in dispute so that a jury viewing the evidence rationally could consistently find the defendant not guilty of the charged offense but guilty of the misdemeanor. See *Steele, supra* at 20.

Like second-degree CSC, fourth-degree CSC requires a showing of "sexual contact" plus an aggravating circumstance. See MCL 750.520e(1); MSA 28.788(5)(1). Because the jury would have to find "sexual contact" to find defendant guilty of either the charged offense or the misdemeanor, the elements differentiating the crime were the aggravating circumstances. The fact that the complainant was between the ages of thirteen and sixteen and a member of defendant's household at the time of the offense was not in dispute. Thus, a jury viewing the evidence rationally could not find defendant guilty of fourth-degree CSC without also finding defendant guilty of second-degree CSC. Therefore, we hold that the trial court did not abuse its discretion in refusing to instruct the jury on fourth-degree CSC. See *Steele, supra* at 20-21.

Finally, defendant argues that he was denied the right to the effective assistance of counsel when his counsel at trial (1) failed to move for a directed verdict on the charge of second-degree CSC on the basis that there was no evidence of sexual arousal or gratification on the part of defendant, (2) failed to object to the jury instruction on the elements of second-degree CSC, because it did not require the jury to find sexual arousal or gratification on the part of defendant, and (3) failed to offer transcripts from prior proceedings when the jury requested to see transcripts during deliberations and did not specify

whether it desired to see transcripts from the trial or from the prior proceedings. We disagree. To justify reversal on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was both deficient, and that it prejudiced the defense. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Because sexual arousal or gratification on the part of defendant is not an element of the offense of second-degree CSC, counsel's performance was not deficient and defendant was not prejudiced by counsel's performance with regard to defendant's first two claims of ineffective assistance counsel. As for defendant's third claim of ineffective assistance, because the transcripts from the prior proceedings had not been admitted into evidence and the jury would not have been entitled to see them, defense counsel's failure to offer them to the jury was neither deficient nor prejudicial.. Accordingly, we hold that defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Richard A. Bandstra